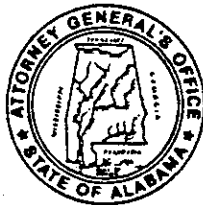


# OFFICE OF THE ATTORNEY GENERAL

83-00002



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OCT 1 1982

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Honorable Glenn M. Smitherman  
Sheriff  
Bibb County  
Centreville, Alabama 35042

Rivers and Streams - Canoes -  
Navigable Waters

Riparian owners do not have complete control of and cannot prevent the public from using a navigable river in recreational navigation. Persons using the river do not have the general authority to indiscriminately land upon the riverbanks without the permission of the land owners, but may land in cases of danger or necessity.

Dear Sheriff Smitherman:

You have requested of this office an opinion respecting the following questions:

- (1) Do the owners of land on both sides of the Little Cahaba River have complete control of the river?
- (2) Can they prevent canoers from using the river through their property?
- (3) If the canoers use the river, do they then have the authority to use the river banks without permission of the land owners?

(4) If the canoers use the river, do they have the authority to use the small islands in the river?

Your four questions depend in essence upon the question of whether or not the river in question is a navigable river. Article 1, Section 24 of the Constitution of Alabama of 1901 provides in pertinent part that "all navigable waters shall remain forever public highways, free to the state and the United States, ..." A stream has been held to be navigable per se if it was meandered (i.e., defined by azimuth and distance) by the surveyor in the original government survey of the State of Alabama. Blackman v. Mauldin, 164 Ala. 331, 51 So. 23. A search of the records of the original government survey now maintained by the Archives Department discloses that the Little Cahaba River which flows into the Cahaba River above Centreville in Bibb County was noted in the original survey, but was not meandered.

In the case of United States v. Holt State Bank, 270 U.S. 49 at 56 (1926) the Court held as follows:

"The rule long since approved by this Court in applying the constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes in trade and travel on water; and further that navigability does not depend upon the particular mode in which such use is or may be had -- whether by steamboats, sailing vessels or flat boats -- nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."  
(Emphasis supplied.)

United States v. Holt State Bank, 270 U.S. 49, 70 L.Ed. 465, 46 S.Ct. 197, see also Blackman v. Mauldin, supra. There is authority that it is not necessary that the navigation be capable for commerce for pecuniary value, that boating or

sailing for pleasure should be considered navigation as well as boating for mere pecuniary profit. State ex rel Lyon v. Columbia Water Power Co., 82 S.Ct. 181, 63 S.E. 884; Attorney General v. Woods, 108 Mass. 436; State v. Korrer, 127 Minn. 60, 148 N.W. 617, Supplemental Opinion 127 Minn. 77, 148 N.W. 1095. Indeed navigability has been defined as having sufficient water during a reasonably long period of time so that logs may be commercially floated down the river. Bayzer v. McMillan Mill Co., 105 Ala. 395 (1895). Investigation, including reference to the United States Geological Survey Maps and records, and to the general knowledge in the vicinity as to the volume of water flowing in the Little Cahaba River indicates that if the question were presented to a court the river would be held to be navigable. Accordingly, it is the opinion of this office that the Little Cahaba River is navigable.

In view of the foregoing, the answers to your first two questions are as follows:

Question 1 is answered negatively. The people who own the land on both sides of the Little Cahaba River do not have complete control of the river. Question 2 is answered negatively. The people who own the land on both sides of the Cahaba River cannot prevent canoers from using the river.

The second two questions, however, are not so simply answered. Section 24 of the Constitution of Alabama of 1901, referred to above, includes language prohibiting tolls for the use of shores, unless expressly authorized by law. However, the riparian owners (owners of lands bordered by a river or stream or through which a river or stream flows) do have certain rights respecting both the use of the water for their own purposes and the prevention of trespass on their property. The riparian owners may take water from the stream and return it to the stream so long as they do not impair the rights of the public upon the water, nor the rights of other riparian owners downstream from them. The public's right to the navigation of the stream is analagous to the public's right to the use of a highway. Harold v. Jones, 86 Ala. 274, 5 So. 438. Those using the river have no right, as incident to the right of navigation, to land upon and use the bank at a place other than a public landing without the consent of the owner. Compton v. Hawkins, 90 Ala. 411, 8 So. 75. However, in the case of peril or emergency, danger or necessity a landing may be made upon the bank without the consent of the riparian owner. Compton v. Hawkins, supra.

Honorable Glenn M. Smitherman  
Page Four

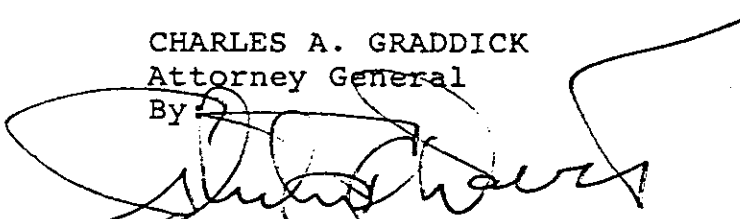
In view of the foregoing the answer to your third question is negative with reservations. Persons navigating on the river do not have a general authority to use the river banks without permission of the riparian owners, however, in cases of danger or necessity a landing may be made upon the bank without the consent of the riparian owner.

The answer to your fourth question must be more general than the foregoing. If the small islands in the river are actually sandbars, which may form and disappear from time to time, and are periodically inundated by the river, and accordingly have little or no vegetation growing upon them, then they are a portion of the riverbed and part of the public domain. If however, they are of sufficient size and height as to be susceptible of private ownership then they become riparian lands subject to the same limitations as the lands along the banks of the river.

In summary, the riparian owners along the Little Cahaba river, whether or not they own both sides of the River do not have complete control of the river and cannot prevent the public from using the river in recreational navigation. Persons using the river do not have the general authority to indiscriminately land upon the riverbanks without the permission of the land owners, but may land in cases of danger or necessity. The public in using the river is urged by this office to respect the rights of the riparian owners and to make every effort not to invade the privacy of such riparian owners, nor to trespass unnecessarily upon their property while such owners similarly are urged to respect the rights of the members of the public using the river.

I trust that the foregoing answers your questions.

Yours very truly,

CHARLES A. GRADDICK  
Attorney General  
By: 

PHILIP C. DAVIS  
Assistant Attorney General

CAG/PCD/pm